

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

SIERRA CLUB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-16-134-F
	)	
CHESAPEAKE OPERATING LLC,	)	
et al.,	)	
	)	
Defendants.	)	

**DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S  
SECOND MOTION TO SUPPLEMENT**

The correspondence attached to Plaintiff's "Motion to Supplement Plaintiff's Opposition to the Motions to Dismiss" (Doc. 106) provides further support for this Court to dismiss Plaintiff's claims under the *Burford* abstention and/or primary jurisdiction doctrines. Specifically, the letters show that the Oklahoma Corporation Commission ("Commission") continues to exercise its regulatory authority to take "whatever action is necessary" to respond to seismicity concerns within the State. Okla. Stat. Ann. tit. 17, § 52(D); Okla. Stat. Ann. tit. 52, § 139.

The first exhibit to Plaintiff's Supplement is a November 22, 2016 letter from the Region 6 Regional Administrator of the EPA to the Commission addressing, primarily, two earthquakes that occurred in November near Pawnee and Cushing, Oklahoma. (Doc. 106-1 at 1.) In that letter, EPA notes its appreciation and encouragement of the "important steps," such as "restricting the use of underground injection wells in the Arbuckle formation" and "recent actions . . . to shut-in and reduce injection volumes in

wells located in areas of concern,” being taken by the Commission in regulating Class II injection wells under the State’s Safe Drinking Water Act (“SDWA”) program approved and delegated by EPA to the Commission for implementation. (*Id.*) EPA’s letter also encourages the Commission to adopt “further actions to address disposal well-related pressure buildup in the Arbuckle Formation.” (*Id.* at 2.)

Contrary to Plaintiff’s assertions, EPA’s letter does not reference the Resource Conservation and Recovery Act (“RCRA”), let alone address whether a conflict exists between application of RCRA and the SDWA in this context. (*Id.*) Instead, EPA recognizes the ample authority the Commission has to address seismicity under its EPA-delegated Class II underground injection control program and merely suggests that the Commission consider produced water treatment strategies in addition to its ongoing direct regulation of injection volumes and pressures. (*Id.*)

The second exhibit attached to Plaintiff’s Supplement is the Commission’s November 29, 2016 response to EPA. (Doc. 106-2.) In that response, the Commission advises EPA that “[a]mong the many critical matters that face the agency, none is more important than the earthquake issue.” (*Id.* at 1.) The Commission states that work is already underway to build on recent directives to craft a regulatory response to recent seismicity near Pawnee and Cushing, Oklahoma. The letter also notes that a State task force is studying alternative methods for handling produced water from oil and gas wells, that the Commission has provisionally approved an application for a recycling operation, and that it “support[s] . . . applications from Arbuckle disposal well operators to change

disposal into other formations . . . .” (*Id.*) These are precisely the “further actions” that EPA requested the Commission to consider. (*Id.*)

The Sierra Club’s assertion that the Commission “has limited permitting authority over certain facilities that discharge into the Arbuckle formation” is misleading, at best. (Doc. 106 at ¶ 6.) The facilities referred to in the Commission’s letter are surface recycling facilities (Doc. 106-2 at 4), not the Class II Arbuckle injection wells at issue in this case; accordingly, the Sierra Club’s assertion is simply a distraction from arguments before the Court on Defendants’ Motions to Dismiss. The Sierra Club’s statement further ignores the comprehensive state-wide approach the Commission takes to address seismicity through direct regulation of disposal wells and volumes.

Taken together, the November 22 and 29 letters represent EPA’s recognition that the Commission has taken and continues to take important and useful steps to address seismicity. Plaintiff’s Complaint asks that this Court supersede the Commission and serve as the regulator-in-chief of Oklahoma’s Class II injection wells. Defendants respectfully request that the Court decline to exercise this authority under the *Burford* and/or primary jurisdiction doctrines, and allow the Commission to continue its active and ongoing regulatory control over this matter of substantial state-wide concern.

Respectfully submitted,

/s/ John J. Griffin, Jr.

JOHN J. GRIFFIN, JR., OBA #3613  
L. MARK WALKER, OBA #10508  
CROWE & DUNLEVY  
Braniff Building  
324 North Robinson Avenue, Suite 100  
Oklahoma City, Oklahoma 73102  
(405) 235-7718  
(405) 272-5225 (Facsimile)  
[john.griffin@crowedunlevy.com](mailto:john.griffin@crowedunlevy.com)  
[mark.walker@crowedunlevy.com](mailto:mark.walker@crowedunlevy.com)

RONALD G. FRANKLIN  
CHARLES B. HAMPTON  
*Admitted Pro Hac Vice*  
MCGUIRE WOODS  
500 Travis St., Suite 7500  
Houston, TX 77002  
(713) 571-9191  
[rfranklin@mcguirewoods.com](mailto:rfranklin@mcguirewoods.com)  
[champton@mcguirewoods.com](mailto:champton@mcguirewoods.com)

JOY C. FUHR  
*Admitted Pro Hac Vice*  
MCGUIRE WOODS  
800 Gateway Plaza  
Richmond, VA 23219  
(804) 775-1100  
[jfuhr@mcguirewoods.com](mailto:jfuhr@mcguirewoods.com)

**ATTORNEYS FOR DEFENDANT DEVON  
ENERGY PRODUCTION COMPANY,  
L.P.**

*s/Matthew C. Kane*

(Signed by Filing Attorney  
with Permission of Attorney)  
Phillip G. Whaley, OBA#13371  
Matthew C. Kane, OBA#19502  
RYAN WHALEY COLDIRON JANTZEN  
PETERS & WEBBER PLLC  
900 Robinson Renaissance  
119 North Robinson  
Oklahoma City, OK 73102

Telephone: (405) 239-6040  
Facsimile: (405) 239-6766  
[pwhaley@ryanwhaley.com](mailto:pwhaley@ryanwhaley.com)  
[mkane@ryanwhaley.com](mailto:mkane@ryanwhaley.com)

Karl S. Bourdeau, DC No. 249367  
Bina R. Reddy, DC No. 984493  
*Admitted Pro Hac Vice*  
BEVERIDGE & DIAMOND, P.C.  
1350 I Street NW, Suite 700  
Washington, DC 20005  
Telephone: (202) 789-6000  
Facsimile: (202) 789-6190  
[kbourdeau@bdlaw.com](mailto:kbourdeau@bdlaw.com)  
[breddy@bdlaw.com](mailto:breddy@bdlaw.com)

**ATTORNEYS FOR DEFENDANT  
CHESAPEAKE OPERATING, L.L.C.**

/s/ Robert G. Gum

Signed by Filing Attorney  
with Permission of Attorney)  
Robert G. Gum, OBA No. 3659  
April B. Coffin, OBA No. 31965  
Gum, Puckett & Mackechnie, L.L.P.  
105 North Hudson, Suite 900  
Oklahoma City, OK 73102  
Telephone: (405) 488-1212  
Facsimile: (405) 488-1216  
[rggum@gpmlegal.net](mailto:rggum@gpmlegal.net)  
[abcoffin@gpmlegal.net](mailto:abcoffin@gpmlegal.net)

**ATTORNEYS FOR DEFENDANT  
NEW DOMINION, L.L.C.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM-ECF system on this 21st day of February, 2017.

/s/ John J. Griffin, Jr. \_\_\_\_\_